**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-0681**

In the Matter of the Welfare of: D. V.-L., Child.

**Filed November 13, 2018**
**Affirmed**
**Reyes, Judge**

Hennepin County District Court
File No. 27-JV-18-767

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Assistant County Attorney, Minneapolis, Minnesota (for appellant Hennepin County)

Mary F. Moriarty, Hennepin County Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for respondent D. V.-L.)

Considered and decided by Florey, Presiding Judge; Ross, Judge; and Reyes, Judge.

**U N P U B L I S H E D  O P I N I O N**

**REYES**, Judge

Appellant Hennepin County Attorney's Office appeals the district court's denial of its motion for presumptive adult certification of respondent juvenile. We affirm.

## FACTS

On February 10, 2018, police officers responded to reports of a shooting in Minneapolis. Upon arriving at the scene, officers found the victim lying on the street with a gunshot wound near his spine and another in his arm. Officers learned from the victim that he was walking home when a vehicle driven by respondent D.V.-L. approached him.

D.V.-L exited the vehicle's passenger side, walked toward the victim, pulled a handgun from behind his back, and shot the victim multiple times. D.V.-L. got back into the vehicle and left the scene. As a result of his injuries, the victim is a paraplegic. D.V.-L. and the victim had a prior altercation during which the victim pulled a knife on D.V.-L.

Officers arrested D.V.-L. at his home later that night. D.V.-L. admitted to shooting the victim and has been detained in the Hennepin County Juvenile Detention Center (JDC) since the night of the incident. The state charged D.V.-L. with one count of attempted second-degree murder pursuant to Minn. Stat. § 609.19, subd. 1(1), and one count of first-degree assault pursuant to Minn. Stat. § 609.221, subd. 1 (2016).

D.V.-L. turned eighteen on August 7, 2018. Because D.V.-L. was seventeen-and-a-half years old at the time of the incident, the state moved for presumptive certification of the proceeding under Minn. Stat. § 260B.125, subd. 3 (2016). The psychologist who conducted the certification study diagnosed D.V.-L. with unspecified depressive-use disorder and marijuana-use disorder. He also noted a significant number of events that may have contributed to D.V.-L.'s depression in recent years, including his father's problematic alcohol use and subsequent medical issues, being a victim of an assault, and having issues with school. The psychologist also conducted a violence-risk assessment and considered D.V.-L. to be at a moderate risk for future violence.

The psychologist ultimately concluded that retaining D.V.-L. in the juvenile court on extended-juvenile jurisdiction (EJJ) would serve public safety. While the probation officer did recommend adult certification, she stated that D.V.-L. could be effectively treated in the amount of time he has remaining under EJJ supervision. D.V.-L. has been

accepted into two residential juvenile-correctional-treatment centers and could also be placed at the Red Wing Juvenile Correctional Facility.

During his detention at the JDC, D.V.-L. has had positive interactions with peers and staff, has participated in the various programming and recreational activities that are offered, and has not had any behavioral issues. D.V.-L. has no juvenile-delinquency history, and his only prior criminal history includes a petty misdemeanor charge of possession of a small amount of marijuana. He completed a one-day diversion program, and the state dismissed that charge.

The district court denied the state's motion to certify the proceeding. This appeal follows.

## D E C I S I O N

The state argues that the district court abused its discretion in finding that D.V.-L. had rebutted the presumption for adult certification by showing that retaining the proceeding in juvenile court as an EJJ prosecution served public safety. We disagree.

A juvenile proceeding will be presumptively certified as an adult proceeding if: (1) the juvenile defendant was 16 or 17 years old at the time of the offense and (2) the alleged offense would result in a presumptive prison commitment under the sentencing guidelines and statutes, or a felony offense was committed while using or employing a firearm. Minn. Stat. § 260B.125, subd. 3. The juvenile bears the burden of rebutting this presumption "by demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety." *Id.* If the juvenile satisfies his burden, the juvenile court retains jurisdiction in an EJJ prosecution. *See* Minn. Stat.

§ 260B.125, subd. 8(b) (2016); *Cf. In re Welfare of J.H.*, 844 N.W.2d 28, 35, 40 (Minn. 2014) (juvenile certified as an adult where he did not meet his burden that retaining him under EJJ supervision served public safety). In determining whether public safety is served, the district court must consider the following factors:

> (1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;
>
> (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;
>
> (3) the child's prior record of delinquency;
>
> (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
>
> (5) the adequacy of the punishment or programming available in the juvenile justice system; and
>
> (6) the dispositional options available for the child.

Minn. Stat. § 260B.125, subd. 4 (2016). In analyzing these factors, the district court must give greater weight to the seriousness of the alleged offense and prior record of delinquency. *Id.* The factors "are not a rigid, mathematical equation," however. *In re Welfare of D.M.D., Jr.*, 607 N.W.2d 432, 438 (Minn. 2000).

This court will not reverse the district court's decision unless its findings are "clearly erroneous so as to constitute an abuse of discretion." *In re Welfare of P.C.T.*, 823 N.W.2d 676, 681 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Feb. 19, 2013). A finding is clearly erroneous only if there is no reasonable evidence to support the finding in the record or if this court is left with the "definite and firm conviction that a mistake

occurred." *J.H.*, 844 N.W.2d at 35 (quotation omitted). We view the record in the light most favorable to the district court's findings. *Id.* at 35.

The district court has "considerable discretion" in determining whether a child should be certified for adult prosecution. *In re Welfare of K.M.*, 544 N.W.2d 781, 784 (Minn. App. 1996). That the appellant's version of the facts might lead another trier of fact to make different findings does not render the district court's findings clearly erroneous when there is sufficient contradictory evidence to reasonably support the district court's findings. *See Crosby v. Crosby*, 587 N.W.2d 292, 296 (Minn. App. 1998) (affirming trial court's findings although appellant's version of the facts may have led another trier of fact to make different findings). As an appellate court, our purpose is to correct error and not to retry the case. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 n.2 (Minn. 1979). Because a district court is in a far superior position to determine the credibility of witnesses, we give such determinations considerable deference. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

In analyzing the factors under Minn. Stat. § 260B.125, subd. 4, the district court found that D.V.-L. rebutted the presumption of certification by clear and convincing evidence. Specifically, the district court found that D.V.-L.'s prior record of delinquency, programming history, adequacy of punishment or programming available in the juvenile justice system, and the dispositional options available all weighed in favor of EJJ. The district court found that the seriousness of the offense and culpability weighed in favor of adult certification. On appeal, the parties agree that D.V.-L.'s prior record of delinquency

weighs in favor of EJJ. But the parties disagree on the remaining factors, which we address in turn.

## I. Seriousness of the offense

The state argues that the district court did not give sufficient weight to this factor because it failed to consider the aggravating factors present, including that D.V.-L. treated the victim with particular cruelty, he illegally possessed a firearm, and the victim suffered serious, life-altering injuries. We disagree.

The district court found that this factor "unequivocally favors certification" because D.V.-L.'s actions were done willfully, he was the initial aggressor, he fired a gun in a public area, and he shot at the victim multiple times. The district court also considered the fact that the victim suffered severe injuries as a result of D.V.-L.'s actions.

The state further argues that the more aggravating factors that are present, the less likely EJJ would adequately punish D.V.-L. or serve public safety. However, the only aggravating factor recognized by the sentencing guidelines is that is present here is the "particular cruelty" with which D.V.-L. treated the victim. *See* Minn. Sent. Guidelines 2.D.3.b(1)-(14) (2016). The record indicates that this factor is clearly satisfied, as D.V.-L. shot the victim multiple times and left him to die.

The district court gave great weight to this factor as required, but also found that this was not the only factor to which to assign weight. We discern no clear error here.

## II. Culpability

The district court stated that this factor was "neutral" but ultimately found that it weighed in favor of certification because D.V.-L. failed to rebut the presumption in favor

of certification. The state argues that the district court erred by finding that this factor was "neutral" because D.V.-L. was completely culpable, and there were no mitigating factors present. We agree with the state's argument that this factor is not neutral but agree with the district court's ultimate determination that this favor weighs in favor of certification.

In assessing the child's culpability, the district court may consider "the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines." Minn. Stat. § 260B.125, subd. 4(2). Here, the district court found D.V.-L. to be "fully culpable" because he acted alone in committing the crime, and therefore, this factor weighed in favor of adult certification. The record supports the district court's finding that the culpability factor weighed in favor of adult certification. D.V.-L. acted alone in the commission of this crime.

However, the district court considered whether D.V.L. was "particularly amenable to probation" in assessing culpability. *See* Minn. Sent. Guidelines 2.D.3.a(7) (2016). The district court found that D.V.-L. "is amenable to probation" because he has had no behavior issues at the JDC, has won academic awards, and would therefore be likely to succeed in a similar residential placement with a highly structured environment. The district court's finding related to D.V.-L.'s amenability to probation is supported by testimony from the psychologist that, despite D.V.-L.'s violence, he believes D.V.-L. is a good candidate for treatment. The psychologist opined that D.V.-L. would continue to succeed as he has in the JDC in the structured environment available under EJJ supervision. This finding is

further supported by the probation officer's testimony that it is unusual to see a juvenile with no behavior issues in the JDC.

But Minnesota caselaw and the sentencing guidelines are clear that D.V.-L. must not be merely amenable to probation, but rather, he must be particularly amenable. *Id.*; *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). While the district court correctly cited particular amenability as the requirement, its ultimate finding that D.V.-L. "is amenable to probation" does not rise to the level of a mitigating factor. *See id.*, 855 N.W.2d at 308 (noting that "amenability to probation" as articulated by the district court does not rise to the level of justifying a downward departure"). Moreover, while we note that the sentencing guidelines consider an offender's particular amenability to probation as a mitigating factor, this is an offender-related factor that is relevant only to granting a dispositional departure from the sentencing guidelines, but it is not relevant to whether or not the offense is more or less serious than the typical offense. *State v. Solberg*, 869 N.W.2d 66, 69 (Minn. App. 2015). Therefore, we are not convinced that this factor is relevant to an offender's culpability.

Nonetheless, the district court ultimately found that this factor weighed in favor of certification because D.V.-L. did not rebut this factor by clear and convincing evidence. Therefore, the district court's finding on this factor was not clearly erroneous.

**III. Programming history**

The state argues that this factor supports certification because D.V.-L. continued using marijuana after completing a drug-awareness program and because he has had attendance and behavioral issues at school. We are not persuaded.

In assessing this factor, the district court may consider the child's "past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4). Programming refers to "a specialized system of services, opportunities, or projects designed to meet a relevant behavioral or social need of the child." *J.H.*, 844 N.W.2d at 39. In *J.H.*, the supreme court noted that a child's behavior at school generally does not constitute an example of programming because it does not relate to a specialized system of programming, and its purpose is to provide a basic education, not to address behavioral or social issues related to juvenile delinquency. *Id.*

The district court found that D.V.-L. rebutted the presumption in favor of certification because he has no court-ordered programming history, and he successfully completed a one-day voluntary diversion program for a misdemeanor marijuana-possession charge. The district court did not err by failing to consider D.V.-L.'s behavioral issues and lack of attendance at school and in finding that this factor favors EJJ.

**IV. Adequacy of punishment or programming and dispositional options available**

The crux of the state's argument under the final two factors, which the state argues together, is that the programming options available under EJJ supervision are not adequate in duration because D.V.-L. would have less than forty months under EJJ supervision. We disagree.

The district court found that as of March 2018, D.V.-L. would have approximately 40 months under EJJ supervision and the presumptive sentences for D.V.-L.'s crimes were 153 months for second-degree attempted murder and 86 months for first-degree assault. The district court found that there are several options for intensive out-of-home placements

including the juvenile-detention facility in Red Wing and two residential treatment facilities to which D.V.-L. has been accepted. Both residential options offer mental-health services, family therapy, services to help with coping mechanisms, and an on-campus school. The district court found that these treatment programs could adequately address D.V.-L.'s behavior and serve public safety and that D.V.-L. would have sufficient time to complete the residential treatment programs and have enough time under EJJ supervision.

The district court credited the psychologist's testimony that D.V.-L.'s areas of need, including his depression, limited social support, and coping skills, would be better addressed under EJJ supervision through counseling, family therapy, and vocational or academic programming. Further, the psychologist testified that, based on D.V.-L.'s personality traits, he could benefit from the individualized treatment available under EJJ supervision and would likely be compliant with treatment professionals.

Additionally, though the probation officer recommended certification, she testified that all of D.V.-L.'s needs could be met under EJJ supervision. She stated that D.V.-L. could successfully complete a treatment program and have enough time on supervision while he is under EJJ supervision. She testified that the average stay in a treatment program to which D.V.-L. would attend was nine to twelve months and can extend to 18 months depending on the juvenile's progress in the program. She also testified that if D.V.-L. were certified as an adult, he would be sent to a youthful-offender program at an adult prison, which focuses on the treatment of adults rather than being tailored to juveniles. She further testified that if D.V.-L. were to recidivate while under EJJ supervision, his previously stayed adult sentence could be imposed.

The record supports the district court's findings that the there are several dispositional options available and the punishment options are adequate. The facilities to which D.V.-L. has been accepted will take juveniles under EJJ supervision until their 21st birthday. Based on the length of time D.V.-L. has remaining under EJJ supervision, he has sufficient time to complete the program. Neither the probation officer nor the psychologist indicated that 40 months under EJJ supervision would not be sufficient time for D.V.-L. to successfully complete treatment. Moreover, if respondent recidivates while under EJJ supervision, his previously stayed sentence can be imposed. The district court did not err in finding that the last two factors weighed in favor of EJJ.

In sum, the district court did not abuse its discretion in weighing all of the public-safety factors. The district court appropriately gave greater weight to the seriousness of the offense and D.V.-L.'s lack of a prior delinquency record, and the record supports the district court's findings.

**Affirmed.**